No. 17-494

In The
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF OF THE CITY OF LITTLE ROCK, ARKANSAS, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether this Court should overrule the dormant Commerce Clause holding of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

INTEREST OF THE *AMICUS*

Amicus Curiae – Little Rock, Arkansas – is a municipal corporation and the capital city of the State of Arkansas. It has suffered consequences from this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), while at the same time being burdened with duties created because of internet sales from out-of-state companies to its residents. Ironically, if the City had been able to collect the estimated sales tax revenues barred by the *Quill* decision, it could have paid for various public safety initiatives without the need for credit and interest payments. The large economic impact of companies able virtually to enter a residence and bank account of a City citizen is a presence for which sales taxes should be collected. The rationale for *Quill* should be overturned.

SUMMARY OF THE ARGUMENT

The purpose of an *amicus curiae* brief is to bring "to the attention of the Court relevant matter not already brought to its attention by the parties. . . ." Supreme Court Rule. 37.1. To that end, the legal arguments as to whether the *Quill* rationale should be overturned are not addressed in this *amicus curiae* brief. This presentation is to demonstrate the impact of *Quill* on local governments, like the City of Little Rock, Arkansas, that rely on sales and compensating use taxes to finance daily operations. While macro-figures have been provided to this Court already (Pet.

at 13-14), and rebutted (Opp. at 28-29), just what the current practice does to an actual local government is not mentioned.

ARGUMENT

With the passage of Act 1273 of 2003 Arkansas adopted the Streamlined Sales and Use Tax Agreement. Ark. Code Ann. §§ 26-53-301 to -303 (West 2010 and West Supp. 2018). This was done:

> *. . . in order to stop the loss of sales tax revenue due to the rapid growth of internet sales, to level the playing field between local businesses and out-of-state businesses, and to negate the undue burden on interstate commerce. . . .*

2007 Ark. Acts 180, § 1 [emphasis added]. South Dakota similarly streamlined its sales tax statutes to facilitate such collection. *See South Dakota v. Wayfair, Inc.*, 2017 S.D. 56 * ¶ 17.

According to the most recent estimates of the U.S. Census Bureau, internet sales comprise 8.9% of all sales in the United States. The 2016 sales and compensating use tax figures for the City of Little Rock was $115,125,614.00. An additional 8.9% of this figure for internet sales is $10,010,923.00. However, this $10 million figure would be reduced by state statutory caps on compensating use tax receipts, and by the exemption of certain purchases from any sales or use tax.

In 2017, however, Amazon decided to voluntarily collect sales tax on some of its sales.[1] The State of Arkansas created a special code[2] to capture these sales. For nine months the City of Little Rock collected approximately $500,000.00 for only its 1.5% compensating use tax. When the City's approximately 50% of the 1% Pulaski County compensating use tax is added, and the amount is annualized, the figure is essentially $1 million a year in additional revenues. Yet, as already pointed out to this Court, Amazon represents at most 60% of this internet sales market. Opp. at 31. Conservatively, then, the City of Little Rock should collect at least $1.4 million in additional sales tax revenues that it does not because of *Quill*.

While these revenues were not being collected, the needs of the City of Little Rock, especially in the area of emergency services, continued to grow. During this period of time the City had to use a short time financing note to purchase: (1) a $585,000.00 rescue pumper; (2) a $960,000.00 fire ladder truck; (3) $1.9 million of self-contained breathing apparatus for firefighters;

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[1] Amazon notes that what and how much sales tax is collected depends upon several factors:

> The amount of tax charged on your order depends on many factors including the identity of the seller, type of item or service purchased, the time and location of fulfillment, and the shipment or delivery address of your order.

www.amazon.com/gp/help/customer/342-377display.html@modeled=468512 (last accessed February 22, 2018).

[2] NAICS Code 4541 – Electronic Shopping & Mail Order House.

and (4) $3 million for replacement police patrol vehicles. The citizens were burdened with interest payments, and the City's overall credit rating could have been impacted, to make necessary emergency services purchases which, if *Quill* had already been overruled, would have been unnecessary.

Equally important to the City of Little Rock are its prevention, intervention, and treatment (PIT) programs designed to help youth avoid being the perpetrators or victims of juvenile crime. The City spends approximately $3 million per year on these programs. This commitment is imposed at the expense of other worthwhile and needed City programs.

The City of Little Rock is not unique in this regard. While it is true that the larger the municipality the greater tax revenues will probably be collected, even extremely small communities have constant needs to fulfill. These tax revenues are crucial.

Further, the nature of internet sales is nothing like the mail order businesses in *Quill*. Serious attempts for on-line sales emerged in the mid-1990s. While there were predictions of a virtual business world, there were also major concerns. Even so the technological advances that have led to today's practices were totally unforeseen. Now, customers are introduced to changing website pages and formats. They are allowed to "chat" with a customer representative if desired before making a purchase. Once the item is selected, the customer arranges through a few key strokes where to send the item, whether to gift wrap it,

and physically to pay for it. *See* Neil F. Doherty & Fiona Ellis-Chadwick, *Internet retailing: the past, the present and the future*, http://oro.open.ac.uk/24815/e (last accessed February 22, 2018). In addition to the use of desktop or laptop computers, internet sales are now securely made and paid for on devices such as smartphones. It is estimated that 125 million Americans own smartphones, and 50 million Americans (which may totally overlap the other number) own tablets. Almost 62% (77,500,000) of the smartphones users made internet purchases in 2015. *See* Justin Smith, *Mobile eCommerce States in 2018 and the Future Trends of mCommerce*, www.outerboxdesign.com/web-design-articles/mobile-ecommerce-statistics (last accessed February 22, 2018).

To be sure, these references do not establish as scientific fact these particular statistics. Yet, as pointed out by the State of South Dakota, the purpose of this case is to overturn *Quill* so this evidence, and other relevant evidence, can make an appropriate record for the South Dakota Courts. *See* Reply at 3-4. As noted above, if *Quill* is overturned then appropriate records can be made to establish that the collection of internet taxes because of the economic presence in a particular state is not a burden on interstate commerce.[3]

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[3] It is somewhat ironic to consider the Respondent's complaint that the complexity of sales tax laws in different states would make it impossible for compliance (Opp. at 26), while at the same time lauding Amazon for being able to deal with such issues while currently controlling 50% of the internet sales market. Opp. at 31.

Finally, internet sales are placing new demands on local governments. For example, the modern method of delivery of an internet sale has led to a new type of criminal violation when packages left at addresses are stolen when merely left at addresses. "Porch Piracy," is increasing as a result of the packages from internet sales being left unsecured. *See Had a package stolen off your doorstep? How people are combating 'porch piracy'*, www.mercurynews.com/2017/12/09/had-a-package-stolen-off-your-doorstep-how-people-are-combating (last accessed February 21, 2018); Mike Grabham, *Epidemic: Growing Rate of Package Theft*, www.thepackageguard.com/ups/epidemic-growing-rate-package-theft/ (last accessed February 21, 2018). In the City of Little Rock, over $18 million of property was stolen in 2016 alone. *See* "Stolen and Recovered Property: 2016, *Arkansas Crime Information Center*, www.acic.org/crime-statistics (last accessed February 21, 2018). Yet, none of the revenues the City would receive from its sales taxes for internet sales were available to deal with the reports, the investigations, and the demands on the criminal justice system such internet sales create.

CONCLUSION

There is no attempt by the City of Little Rock to argue in depth the legal merits of this matter. Instead, this *amicus curiae* brief is merely to demonstrate the significant impact that the tremendous economic presence of internet sales has on one local community. Such

an economic presence should be a sufficient basis to determine that *Quill* is antiquated law and should be overturned.

Respectfully submitted,

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